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14 **Lavabit LLC**

15 UNITED STATES DISTRICT COURT
16 CENTRAL DISTRICT OF CALIFORNIA
17 EASTERN DIVISION

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20 IN THE MATTER OF THE
21 SEARCH OF AN APPLE IPHONE
22 SEIZED DURING THE
23 EXECUTION OF A SEARCH
24 WARRANT ON A BLACK LEXUS
25 IS300, CALIFORNIA LICENSE
26 PLATE 35KGD203

Case No.: 5:16-cm-00010-SP-1

BRIEF OF AMICUS CURIAE
LAVABIT LLC IN SUPPORT OF
APPLE INC.'S MOTION TO
VACATE

Date: March 22, 2016
Time: 1:00 p.m.
Place: Courtroom 3 or 4, 3rd
Floor
Judge: Honorable Sheri Pym

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1 **Other Authorities**

2 Edward Moyer, *Obama: NSA Programs Could be 'Redesigned' to*
3 *Prevent Abuses*, CNET (Dec. 20, 2013),
4 [http://www.cnet.com/news/obama-nsa-programs-could-be-](http://www.cnet.com/news/obama-nsa-programs-could-be-redesigned-to-prevent-abuses/)
5 [redesigned-to-prevent-abuses/.....](http://www.cnet.com/news/obama-nsa-programs-could-be-redesigned-to-prevent-abuses/)

6 USENIX Special Interest Group for Sysadmins, The Advanced
7 Computing Systems Association, *System Administrators' Code of*
8 *Ethics* (Sept. 12, 2003), [http://usenix.org/lisa/system-](http://usenix.org/lisa/system-administrators-code-ethics)
9 [administrators-code-ethics.....](http://usenix.org/lisa/system-administrators-code-ethics)

10 **I. Introduction**

11 The Government is seeking extraordinary assistance¹ that far
12 exceeds the scope of the All Writs Act and violates the rights
13 guaranteed to Apple under the United States Constitution. Lavabit
14 is in an unusually helpful position to serve as amicus curiae in this
15 matter because in 2013, it too was compelled to provide
16 extraordinary assistance to the Government. *See In the Matter of the*
17 *Search and Seizure of Information Associated with [REDACTED] that*
18 *is Stored and Controlled at Premises Controlled by Lavabit LLC*, Case
19 No. 1:13SW522 (E.D.V.A 2013). The Government's request is an
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24 _____
25 ¹ This request is extraordinary because it seeks to compel the use,
26 modification, or disclosure of proprietary intellectual property, such
27 as source code or encryption keys, belonging to an innocent third
28 party. In contrast, ordinary assistance would merely seek to compel
access to or the surrender of data subject to an investigation that is
already in the possession of a third party.

1 intrusion not only on Apple, but also on the rights of all Apple
2 customers worldwide. The Government's request should be denied.
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4 5 **II. Background**

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7 In 2013, the Government sought to compel extraordinary
8 assistance from Lavabit without regard for the consequences
9 inflicted upon innocent third parties. Specifically, the consequences
10 to Lavabit as a company, and its reputation for protecting user
11 privacy, along with the tangential harm of surveilling every user
12 who connected to the Lavabit servers.
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15 Specifically, the Government sought to access encrypted e-
16 mails stored on the Lavabit servers, which were impossible to
17 access without a user's password. In contrast to the current
18 situation, and in deference to the target's background and skillset,
19 the Government presumed the password would be impossible to
20 break using brute force. To overcome this barrier, the FBI sought
21 the private encryption key used by Lavabit to protect the Secure
22 Socket Layer ("SSL") and Transport Layer Security ("TLS")
23 connections to their servers.
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1 With the SSL/TLS private key in hand, the FBI would be able
2 to impersonate Lavabit on the Internet. This would allow them to
3 intercept, decrypt, inspect, and modify (either with intent, or by
4 accident) all of connections between Lavabit and the outside world.
5 Presumably connections which were associated with the target
6 would be recorded. This “man in the middle attack” as it is more
7 commonly known, would have allowed them to steal the target’s
8 password upon their next login, and access the encrypted data.
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13 In the same vein, the Government now seeks extraordinary
14 assistance from Apple. For the reasons set forth below, the
15 Government’s request should be denied.
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17 **III. ARGUMENT**

18 **A. The Government Seeks Extraordinary Assistance From** 19 **Apple That Far Exceeds The Assistance It Has Previously** 20 **Sought In Cases Involving The All Writs Act.**

21 The Government’s motion seeks to force Apple engineers and
22 expropriate the company’s private intellectual property to facilitate
23 an investigation. This represents an effort to compel Apple to
24 provide extraordinary assistance in a way that exceeds the Court’s
25 power under the All Writs Act.
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1 Courts have used the All Writs Act as a means to compel third
2 parties to offer ordinary assistance to the Government. In *United*
3 *States v. New York Tel. Co.*, the United States Supreme Court held
4 that a district court correctly ordered a telephone company to
5 install a pen register on a user's telephone line at the Government's
6 request. 434 U.S. 159 (1977). The Court explained the standard for
7 forced compliance cases and defined the scope of the All Writs Act
8 as applied to third parties who are in a position to frustrate the
9 implementation of a court order, or the proper administration of
10 justice. *Id.* at 174. The telephone company argued that allowing the
11 Government to order it to install a pen register on a subject's
12 telephone line would create a slippery slope and make the All Writs
13 Act a catchall for Government action. The Court disagreed and held,
14 in part, that the requested Government action was benign because
15 the telephone company regularly used pen registers. *Id.*² This

24 ² The Court explained that a public utility company with a duty to
25 serve the public had a substantial duty to provide assistance. The
26 use of pen registers was not offensive because the company
27 regularly used pen registers for checking billing operations,
28 detecting fraud, and preventing violations of law. The Court also
reasoned that the request was not offensive because the company
agreed to supply the FBI with all the information necessary to

1 benign action is the sort of ordinary assistance allowed under the
2 All Writs Act.
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4 The Government is not seeking *ordinary assistance* from
5 Apple. Rather, the Government is seeking *extraordinary assistance*
6 that far exceeds the scope permitted under the All Writs Act. This
7 type of assistance was not contemplated by the Court in *New York*
8 *Telephone* and has never been permitted by any court in any
9 jurisdiction. The Government is not simply seeking information
10 about a single iPhone user. The Government is demanding that,
11 under penalty of law, a private entity be required to engineer, test,
12 and produce custom software using Apple's highly valuable
13 intellectual property to obtain data stored on an individual's iPhone.
14 This goes far beyond ordering the installation of a benign pen
15 register. The Government's extraordinary request eviscerates the
16 purpose of the All Writs Act, and unnecessarily compromises the
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24 install its own pen registers. Additionally, the Court noted that
25 because the order from the lower court provided that the company
26 be reimbursed, compliance with the request required minimal effort
27 from the company, and there would be no disruptions to the
28 company's operations, the Government's request was not
burdensome.

1 proprietary intellectual property of a private company that has not
2 been implicated, in any way, with the crime under investigation.
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4 Congress does not hide elephants in mouseholes. *Whitman v.*
5 *Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001). If Congress had
6 intended that private entities and individuals be forced to provide
7 such extraordinary assistance to Government investigations,
8 Congress would have passed a law to that extent.
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11 **B. The Government's Request Is Unduly Burdensome.**

12 Apple sells more than a product – it sells a global brand.
13 Millions of people have come to trust the Apple brand and its
14 products. An important basis for that trust is that Apple represents
15 to consumers that their personal and private information will be
16 secure on its devices. People keep many types of private and
17 personal information on their Apple devices, including financial
18 information, e-mails, text messages, personal notes, reminders,
19 calendar appointments, and confidential client information. The
20 Supreme Court recently explained that these phones could just as
21 easily be called “minicomputers” because of the vast quantities of
22 information they can store and the varying functions they can
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1 perform. *See Riley v. California*, 134 S. Ct. 2473, 2489 (2014). In
2 the wrong hands, such information can be used for identity theft,
3 harassment, blackmail, and other evils.
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5 Apple consumers are comfortable putting valuable and
6 personal information on their iPhones because of Apple's
7 advancements in security and encryption protocols on its operating
8 system ("iOS"). In fact, Apple engineered an iOS so secure that even
9 the company's access to the private information on a locked iPhone
10 is intentionally limited. Apple purposefully declined to build a
11 "backdoor" into the iOS because it knows that the system would
12 then become vulnerable to attacks by bad actors seeking to access
13 and exploit the information stored on the system.
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18 Technology companies that develop such secure methods of
19 storing private and sensitive information develop a bond of trust
20 with their customers.³ They rely on these companies to ensure that
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24 ³ System Administrators, who are responsible for vast quantities of
25 confidential data, have long been held to an ethical code requiring
26 them to "maintain and protect the confidentiality of any information
27 [they] came into knowledge of it." USENIX Special Interest Group for
28 Sysadmins, The Advanced Computing Systems Association, *System
Administrators' Code of Ethics* (Sept. 12, 2003),

1 their information will remain private, secure, and away from the
2 prying eyes of hackers, dictators, and others who would
3 compromise their privacy for nefarious purposes. Doctors use the
4 devices to store confidential medical information. Lawyers use the
5 devices for privileged communications with their clients. Ordering
6 Apple to construct a new operating system that can be forcefully
7 loaded on an individual's iPhone means coercing Apple, to violate
8 the sacred trust it has built with its customers. This violation will
9 harm both its competitive advantage, its reputation as a
10 manufacturer of secure devices, and, by extension, harm other
11 companies, like Lavabit, that have developed secure storage
12 methods.

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14 Hush Mail, a Canadian e-mail company represents what can
15 happen when a technology company is forced to acquiesce to a
16 demand to defeat its own security. Hush Mail provides a secure e-
17 mail service to its customers and was once an employer to over fifty

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<http://usenix.org/lisa/system-administrators-code-ethics>.
26 Technology companies that have elevated access to confidential
27 information are, in many ways, the modern descendants of such
28 system administrators and most of those companies would almost
certainly agree that they are bound to the same ethical obligations.

1 individuals. When the Canadian government forced the company to
2 produce the confidential communications of one of its customers,
3 Hush Mail was economically devastated, laying off nearly all of its
4 employees. *See Ex. A. Affidavit of Cliff Baltzley.*

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7 Although Apple's customer base may be broader than Hush
8 Mail's, it is against public policy for the Court to take action that
9 risks harming an innocent American business. Moreover,
10 establishing precedent that allows the Government unfettered use
11 of the All Writs Act to force companies to build backdoors into
12 secure digital infrastructures will be extraordinarily harmful to
13 American-based entities like Lavabit. Such precedent would likely
14 result in many businesses moving their operations offshore,
15 therefore, making it more difficult for law enforcement to obtain
16 even ordinary assistance from such companies.

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21 **C. The Government's Request Violates Apple's First and**
22 **Thirteenth Amendment Rights.**

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24 The Government's position violates Apple's Constitutional
25 right to free speech and to be free from involuntary servitude. The
26 fact that Apple is a corporation and not an individual is of no
27 consequence. As a corporation, Apple has the same rights and
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1 privileges as an individual and is therefore entitled to the protection
2 of the First and Thirteenth Amendments. Apple is being compelled
3 to provide speech that contravenes its fundamental beliefs, that is,
4 the belief that its customers should have the highest level of
5 security and privacy in their personal data. The proposed action will
6 also violate the Thirteenth Amendment by forcing Apple to perform
7 labor against its will. The Government's proposed use of the All
8 Writs Act, therefore, is unconstitutional as applied to Apple.
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13 **1. The Government's position violates Apple's**
14 **Constitutional right to free speech.**

15 Under the First Amendment, both spoken words and symbolic
16 actions qualify as protected speech. The First Amendment's
17 protection "does not end at the spoken or written word." *Texas v.*
18 *Johnson*, 491 U.S. 397, 404 (1989) (citing *Spence v. Washington*,
19 418 U.S. 405, 409-11 (1974)). The First Amendment guarantees
20 individuals the right to speak freely and the right to refrain from
21 speaking or endorsing beliefs with which one does not agree. *West*
22 *Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 645 (1943).
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26 "Since all speech inherently involves choices of what to say and
27 what to leave unsaid, one important manifestation of the principle
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1 of free speech is that one who chooses to speak may also decide
2 what not to say.” *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp.*
3 *of Bos.*, 515 U.S. 557, 573 (1995) (citations omitted) (internal
4 quotation marks omitted). The Supreme Court has emphasized that
5 the protections of the First Amendment extend to corporations and
6 individuals alike. *Citizens United v. FEC*, 558 U.S. 310 (2009)
7 (“[s]peech does not lose First Amendment protection simply because
8 its source is a corporation”).
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13 Further, the government may not require “affirmation of a
14 belief and an attitude of mind,” *West Virginia State Bd. of Educ.*, 319
15 U.S. at 633. Mandating speech that a speaker would not otherwise
16 make necessarily alters the content of the speech. *Riley v. Nat'l*
17 *Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781 (1988). Apple
18 clearly demonstrates its interest in protecting and securing the
19 privacy of its users in its brief. *See* Apple Inc.’s Motion to Vacate
20 Order Compelling Apple Inc. to Assist Agents in Search and
21 Opposition to Government’s Motion to Compel Assistance. Ordering
22 Apple to access the data on its customer’s iPhone goes against its
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1 fundamental stance on privacy and compromises its core beliefs in
2 maintaining a secure operating system for its users.
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4 If the Government is successful, then Apple users will be
5 unable to distinguish between Apple's voluntary speech and speech
6 that is compelled by the Government. An example of the negative
7 externalities that may arise from such confusion involves Apple's
8 use of automatic updates for iOS. These updates are important, and
9 range from providing consumers with new features to fixing glitches
10 in the software. Automatic updates are often critical to iOS security
11 because they fix new vulnerabilities. Because consumers trust
12 Apple, many iPhone owners have these automatic updates turned
13 on. If the Government is successful, however, many consumers may
14 not be as trustful of these updates – because of a fear (actual or
15 imagined) that the updates will contain malware to provide a
16 backdoor into the data on their iPhones. The result is that fewer
17 people will automatically accept the automatic updates and the
18 overall security of iPhones across the country will suffer.
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26 **2. The Government's position violates Apple's**
27 **Constitutional right to be free from involuntary**
28 **servitude.**

1 The Thirteenth Amendment to the United States Constitution
2 protects an individual's right to be free from involuntary servitude,
3 except in exceptional circumstances. *United States v. Kozminski*,
4 487 U.S. 931, 943-44 (1988). Such exceptional circumstances are
5 not present in this case, and therefore, the Government's attempt to
6 force Apple to generate new software violates the Thirteenth
7 Amendment.⁴

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11 The adoption of the Thirteenth Amendment in 1865 abolished
12 slavery in the United States. It is not, however, limited to that
13 purpose and also includes other forms of involuntary servitude. *Id.*
14 at 942. The Thirteenth Amendment expressly prohibits forcing labor
15 on another, except in limited circumstances, none of which are
16 present in this case.
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20 The exceptions to the Thirteenth Amendment are narrow;
21 limited to cases well established in common law at the time of the
22 Thirteenth Amendment's ratification. For instance, the conscription

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25 ⁴ Obviously, Lavabit does not in any way analogize this dispute
26 between Apple and the U.S. Government, to the institution of
27 slavery. Nevertheless, the clear text of Thirteenth Amendment, and
28 its supporting case law, prohibit the Government's motion seeking
to force Apple, under penalty of law, to provide a service that it does
not wish to provide.

1 of Americans into military service does not amount to a violation of
2 the Thirteenth Amendment. *Id.* at 943-44 (citing *Selective Draft Law*
3 *Cases*, 245 U.S. 366, 390 (1918)). The common law institution of
4 forced jury service is also not a violation. *Id.* (citing *Hurtado v.*
5 *United States*, 410 U.S. 578, 589, n. 11 (1973)). *See also* *Butler v.*
6 *Perry*, 240 U.S. 328 (1916) (holding that forced roadwork is not a
7 violation of the Thirteenth Amendment); *Robertson v. Baldwin*, 165
8 U.S. 275 (1897) (holding that the rights of parents and guardians to
9 the custody of their minor children, as well as laws preventing
10 sailors who contracted to work on vessels from deserting their
11 ships, do not violate the Thirteenth Amendment). In describing
12 these exceptions, the Supreme Court in *Butler v. Perry* explained
13 that, “[t]he great purpose in view was liberty under the protection of
14 effective government, not the destruction of the latter by depriving it
15 of essential powers.” 240 U.S. at 333.
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23 Unlike the cases of forced military service or jury duty, here
24 the Government is not exercising an essential power that protects
25 effective government. Requiring Apple to engineer a new product to
26 infiltrate the iPhone of a deceased criminal is not recognized as an
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1 essential government power. As the Government's request is an
2 unconstitutional attempt at involuntary servitude in violation of the
3 Thirteenth Amendment, it should be denied.
4

5 **IV. CONCLUSION**

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7 In discussing the N.S.A.'s controversial bulk data collection
8 program in 2013, President Obama opined that "just because we
9 can do something doesn't mean we necessarily should, and the
10 values that we've got as Americans are ones that we have to be
11 willing to apply beyond our borders." Edward Moyer, *Obama: NSA*
12 *Programs Could be 'Redesigned' to Prevent Abuses*, CNET (Dec. 20,
13 2013), [http://www.cnet.com/news/obama-nsa-programs-could-be-](http://www.cnet.com/news/obama-nsa-programs-could-be-redesigned-to-prevent-abuses/)
14 [redesigned-to-prevent-abuses/](http://www.cnet.com/news/obama-nsa-programs-could-be-redesigned-to-prevent-abuses/). That analysis is quite important
15 here. It might be technologically possible for Apple to construct a
16 backdoor iOS for the iPhone that will give others access to sensitive
17 and encrypted data. But doing so would require weakening
18 Americans privacy and harming American businesses. Lavabit
19 hopes that the United States will take steps forward towards
20 protecting electronically privacy. This case is an important
21 opportunity for the Court to take a step in that direction—a step,
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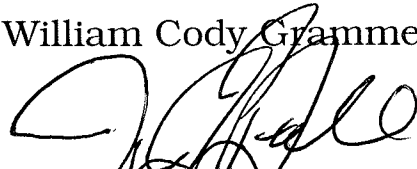
1 for instance, that could be an important factor in Lavabit opening
2 its doors to email customers once again someday. Because the
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4 Government's proposal is not authorized by statute and is
5
6 prohibited by the Constitution, Lavabit urges the Court to grant
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8 Apple's Motion to Vacate Order Compelling Assistance and deny the
9
10 Government's Motion to Compel Assistance.
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13 Dated: March 3, 2016


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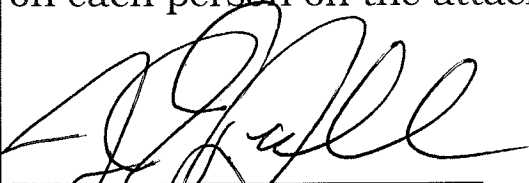
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1 **PROOF OF SERVICE**

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4 On March 3, 2016, I caused to be served through mail (USPS)
5 and e-mail the foregoing document described as:
6

7 BRIEF OF AMICUS CURIAE LAVABIT LLC IN SUPPORT OF APPLE
8 INC.'S MOTION TO VACATE
9

10 on each person on the attached Service List.

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